

GAHC010215962023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Crl.)/926/2023

MOHUR UDDIN @ MOHURUDDIN
S/O LATE ALI SARKAR, R/O HAHCHARI, P.S.- CHHAYGAON, DIST.-
KAMRUP (ASSAM).

VERSUS

THE STATE OF ASSAM AND ANR.
TO BE REP. BY THE P.P., ASSAM.

2:MAYURJAN NESSA
W/O ALEK UDDIN

R/O HAHCHARI
P.O.- KALATOLIBAZAR
P.S.- CHHAYGAON
DIST.- KAMRUP (ASSAM)
PIN- 781136

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

ORDER

Date : 19.06.2024

(R. Phukan, J)

Heard Mr. H.R.A. Choudhury, learned Senior Counsel assisted by Mr. I.U. Chowdhury, learned counsel for the applicant/appellant and Ms. B. Bhuyan, learned Senior counsel and Additional Public Prosecutor assisted by Ms. M. Chakraborty, learned counsel for the respondent No. 1, State of Assam.

2. This application under Section 389 of the Code of Criminal Procedure ('Cr.P.C.', for short) is preferred by the applicant/appellant Mohur Uddin @ Mohuruddin for suspension of sentence and to release him on bail during the pendency of the appeal.

3. It is to be noted here that the applicant/appellant had preferred an appeal against a judgment and order dated 25.07.2023 passed by the learned Additional Sessions Judge-cum-Special Judge (POCSO), Kamrup, Amingaon in Special (POCSO) Case No. 73/2018. It is also to be noted here that vide impugned judgment and order dated 25.07.2023, the learned trial Court had convicted the applicant/appellant under Section 4 of the POCSO Act and sentenced him to suffer rigorous imprisonment for life and also to pay a fine of Rs. 50,000/-, with default stipulation.

4. The background facts, leading to filing of the present application are adumbrated herein below:

“On 13.08.2018, the applicant/appellant, namely, Mohur Uddin, who happened to be the brother-in-law of the informant, namely, Smt. X (name

withheld), entered her house at around 8:30 p.m. and took her 11 years old daughter, namely, Smt. Y (name withheld) by enticing her and promising to show T.V. and inside his house, he gagged the mouth of the victim girl and committed rape upon her and also threatened her not to disclose the same to anyone, else to kill her. Thereafter, investigation was carried out and having found a prima facie case, the I.O. laid charge-sheet against the applicant/appellant Mohur Uddin to stand trial in Court under Section 498A, IPC, read with Sections 4/6 of the POCSO Act. Upon the said charge-sheet, the learned trial Court had taken cognizance of the offence under Section 376 (AB), IPC, read with Section 4 of the POCSO Act and on appearance of the applicant/appellant, framed charge against him under Section 376, IPC, read with Sections 4/6 of the POCSO Act and the applicant/appellant pleaded not guilty to the charge. Thereafter, the prosecution side had examined as many as six witnesses and exhibited five documents and thereafter closing the prosecution evidence, the learned trial Court had examined the applicant/appellant under Section 313, Cr.P.C. and after hearing arguments of both sides, convicted and sentenced him as aforesaid."

5. Being highly aggrieved, the applicant/appellant preferred an appeal, being Criminal Appeal No. 369/2023, challenging the correctness or otherwise of the judgment and order of the conviction and sentence, dated 25.07.2023, and along with the said appeal, this interlocutory application, under Section 389, Cr.P.C. is preferred by the applicant/appellant for suspension of sentence and to enlarge him on bail.

6. The state respondent had filed written objection. It is stated that the victim girl in her evidence clearly narrated as to how she was subjected to penetrative

sexual assault having taken her to his house at night on the pretext of watching T.V. The informant, who happened to be her mother, also corroborated her version and the evidence of the Doctor (P.W.4) indicates that the age of the victim was in between 12 to 14 years. It is also stated that the prosecution side has successfully established the guilt of the applicant/appellant and therefore it is contended to dismiss the application.

7. On receipt of notice, issued by this court, the respondent No. 2 had entered appearance through her counsel Mr. F.A. Hassan and filed an affidavit, opposing grant of bail to the applicant/appellant on the ground that the applicant/appellant has induced the minor girl and thereafter, committed the offence and the learned trial Court had rightly arrived at the finding of guilt of the applicant/appellant under Section 4 of the POCSO Act. It is also stated that the applicant is a notorious criminal and he may cause serious threat to the life and property of the informant, and that there is every chance of jumping bail, if he is granted such a privilege and therefore, it is contended to dismiss the application.

8. Mr. H.R.A. Choudhury, learned Senior Counsel for the applicant/appellant submits that there is delay of three days in lodging the FIR, and no proper explanation is offered for the same and this cast a serious doubt about the veracity of the prosecution case. Mr. Choudhury also pointed out that there are material discrepancies in the version of the prosecution witnesses, specially in the evidence of the informant and the victim, in respect of the place of occurrence, time of occurrence, and as regard presence of electricity in the house at the relevant point of time and as such, taking the victim on the pretext of watching T.V. cannot be accepted. Further submission of Mr. Choudhury is that the Doctor, after examination of the victim, had not found any kind of

injuries on her person and the evidence of the Doctor, thus, belied the version of the prosecution. Drawing attention of this court to the Medical Report, Mr. Choudhury submits that there is doubt as to whether the Doctor had actually examined the victim or not as the Medical Report indicates the name of the informant as Nurjan Begum, whereas the informant was one Moyurjan Nessa. Mr. Choudhury also submits that there is boundary dispute between the applicant/appellant and the informant for which he was falsely implicated herein this case and therefore, Mr. Choudhury has contended to enlarge the applicant/appellant on bail till disposal of the appeal.

9. On the other hand, Ms. B. Bhuyan, learned Senior Counsel and Additional Public Prosecutor, assisted by Ms. M. Chakravarty, learned counsel, has vehemently opposed the application. Taking this Court through the evidence of the victim girl, Ms. Bhuyan submits that her evidence is firm and throughout consistent and the same could not be shaken in her cross-examination. Ms. Bhuyan also submits that absence of injury on the person of the victim cannot be a ground for disbelieving her version. Moreover, Ms. Bhuyan pointed out that the victim was examined after four days of the occurrence and absence of injury, on the other hand, suggests that there was no serious resistance on the part of the victim who was only 12 years old at the relevant point of time. Further, Ms. Bhuyan submits that the prosecution side has successfully established the foundational facts during trial and as such, the presumption under Sections 29/30 of the POCSO Act are available and the applicant/appellant had failed to rebut the said presumption and that the learned trial Court had rightly arrived at the finding of guilt of the applicant/appellant, and that the appeal is otherwise ready for hearing and as such, the entire matter may be heard on merit and therefore, it is contended to

dismiss the application.

10. Having heard the submission of learned Advocates of both sides, we have carefully gone through the application and the grounds mentioned therein and also gone through the connected appeal and the record of the learned trial Court.

11. The factors, which are required to be taken into consideration while granting post-conviction bail, by suspension of operation of the sentence, under Section 389(1), Cr.P.C., Hon'ble Supreme Court, in the case of **Preet Pal Singh v. State of U.P.**, reported in **(2020) 8 SCC 645** has held that in considering an application for suspension of sentence, the appellate Court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction *prima-facie* erroneous. Where, there is evidence that has been considered by the trial Court, it is not open to a Court considering application under Section 389 to reassess and/or re-analyse the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail.

12. It is also held in the said case that the discretion under Section 389(1), Cr.P.C. is to be exercised judicially. The appellate Court is obliged to consider whether any cogent ground has been disclosed, giving rise to substantial doubt about the validity of the conviction and whether there is likelihood of unreasonable delay in disposal of the appeal as held in the cases of **Kashmira Singh vs. State of Punjab**, reported in **(1977) 4 SCC 291** and **Babu Singh & Ors. vs. State of U.P.**, reported in **1978 (1) SCC 579**.

13. It is further held that even though detailed examination of the merits of the case may not be required by courts while considering an application for bail

but, at the same time, exercise of jurisdiction has to be based on well settled principles and in a judicious manner and not as a matter of course as held by this Court in **Chaman Lal vs. State of U.P. and Anr.**, reported in **(2004) 7 SCC 525**.

14. It is further explained in the said case that there is a difference between grant of bail under Section 439 of the CrPC in case of pre-trial arrest and suspension of sentence under Section 389 of the Cr.P.C. and grant of bail, post conviction. In the earlier case there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held in the case of **Dataram Singh vs. State of U.P. and Anr.**, reported in **(2018) 3 SCC 22**. However, in case of post conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) of the Cr.P.C.

15. It has also been held in the said case that in considering an application for suspension of sentence, the Appellate Court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that has been considered by the Trial Court, it is not open to a Court considering application under Section 389,

Cr.P.C. to re-assess and/or re-analyze the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail.

16. Bearing the aforesaid proposition of law in mind, now an endeavour will be made to adjudge the submissions of the learned Advocates of both the parties, in the light of the materials available on record.

17. It is to be noted here that to bring home charge under section 4 of the POCSO Act, against the applicant/appellant, the prosecution side had examined as many as six witnesses and exhibited five documents. It had examined the victim girl as P.W.2. Her evidence reveals that on the relevant night, the applicant/appellant came to her house and took her with him to his house on the pretext of watching serial in the T.V. and thereafter, he took her to the kitchen and there, he sat on the floor and opened her panty and took her on his lap and thereafter, inserted his penis into her vagina. Her evidence also reveals that she tried to shout, but, the applicant/appellant threatened to kill her, and thereafter, he allowed her to go. She then reported the matter to her mother and shown her oozing out of blood from her private parts. Thereafter, her mother took her to the house of one Moyan Ali and told him about the incident. Her statement under Section 164, Cr.P.C. also lends corroboration to her version and nothing tangible could be elicited in her cross-examination to discredit her.

18. P.W.1 is the mother of the victim and informant of this case. Her evidence also reveals that on the night of occurrence at around 8:30-9:00 p.m., the applicant/appellant came to her house and took her daughter (victim) with him on the pretext of watching T.V. and assured that he would bring her back home. Then, after an hour, the victim returned home and told her that the applicant/appellant took her to the kitchen and took her on his lap and thereafter, inserted his penis into her vagina. Thereafter, she called the

neighbors' namely, Moyan Ali, Abida and Malek Ali and though she wanted to lodge an FIR immediately, she was prevented by Moyan Ali and Malek Ali and told her that they would resolve the matter as it took place within the family, and as the same could not be resolved, she lodged the FIR with the police station. Nothing tangible could be elicited in the cross-examination of this witness also and thus her evidence fully corroborated the version of the victim.

19. P.W.3 Md. Moyan Ali is the neighbor of the informant. His evidence reveals that on the day of occurrence, at about 9 p.m., the informant came to his house and took him to her house and told that the applicant/appellant took the victim with him to his house on the pretext of watching T.V. and thereafter, took her to his kitchen and committed rape upon her. His evidence also reveals that he tried to settle the matter at the village level, but, the applicant/appellant fled away and thereafter, the FIR was lodged. P.W.5-Smti. Abida Begum also corroborated the version of the P.W.1, P.W.2 and P.W.3.

20. The prosecution side has examined Dr. Rechma Talukdar as P.W.4. Her evidence reveals that she had examined the victim on police requisition, on 17.08.2018, and on physical examination, radiological and laboratory investigation, she opined that:-

- (i) no evidence of recent sexual intercourse detected on her part and;
- (ii) no injury mark detected on her private part at the time of examination except whole hymeneal tear and;
- (iii) her age is above 12 years and below 14 years.

21. From the aforesaid discussion, it becomes apparent that the evidence of the victim is throughout consistent and firm and the evidence of other witnesses also corroborated her version. The age of victim, as per evidence of the Doctor,

was above 12 years and below 14 years and as such she was a 'child' as defined section 2(d) of the POCSO Act. It is a fact that the doctor has not found any kind of injury on her private part, but, the fact remains that the occurrence took place on 13.08.2018 at about 8:30-9:00 p.m. and the P.W.4, the Doctor has examined her on 17.08.2018. And as such, it is natural that after four days no evidence of intercourse could be found. It is also well settled in the case of **Abdul Sayeed vs. State of Madhya Pradesh** reported in **(2010) 10 SCC 259**, that when there is contradiction with the medical evidence vis-a-vis ocular evidence, the ocular evidence will prevail over the medical evidence.

22. As pointed out by Mr. Choudhury, the learned Senior Counsel for the applicant/appellant, some contradictions are here and there in the evidence of the prosecution witnesses. But, the same appears to be not on material point so as to spell inveracity to the version of the prosecution witnesses and there appears to be ring of truth in their versions.

23. Of course, there is delay of three days in lodging the FIR, as submitted by Mr. Choudhury. However, there is also an explanation for such delay. It is evident from the version of the informant that immediately after the occurrence, she had reported the matter to Moyan Ali (P.W.3), and thereafter she wanted to report the matter to police. But, Moyan Ali had prevented her, assuring to settle the matter, as it took place within the family. But, the same could not be materialized as the applicant/appellant had fled away after commission of the offence.

24. Thus, having examined the evidence, so adduced by the prosecution witnesses, and also having examined the impugned judgment and order of conviction, this Court finds no patent infirmity in the same, so as to render the conviction prima facie erroneous. The learned trial Court had considered the

evidence on record in its proper perspective and dealt with all the relevant points, including the issue of boundary dispute, and arrived at a just and reasoned finding and that being so, it is not open for this Court to reassess and re-analyze the same to consider the application under Section 389, Cr.P.C. and to take a different view so as to release the convict on bail.

25. Mr. Choudhury, the learned counsel for the applicant/ appellant, thus, failed to show from the record of the learned trial court, any cogent ground, giving rise to substantial doubt about the validity of the conviction. Besides, the appeal is also ready for hearing and the record of the learned trial Court is also available before this Court and there is no likelihood of unreasonable delay in disposal of the appeal on merit.

26. In the result, having considered the submissions of learned Advocates of both sides and also considering the seriousness of the offence, the age and antecedent of the applicant/appellant and his individual interest and balancing the same with the societal interest, we find this application devoid of merit, and accordingly, the same stands dismissed. However, it is made clear that the observation made here in above, is only for the purpose of disposing of this application under section 389 Cr.P.C., not on the merit of the appeal.

J U D G E

J U D G E

Comparing Assistant